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No. 97-731

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

CHRIS W. BEGGERLY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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We explain in our certiorari petition that the court of appeals' decision warrants review because it is erroneous, it conflicts with decisions of this Court and other courts of appeals, and it presents several important questions concerning the stability of judgments and of title to federal lands. Respondents provide no plausible reason why the petition should be denied; in particular, they do not deny that the decision below conflicts with decisions of other courts of appeals on two of the questions presented (see Pet. 16-17, 25-27; cf. Br. in Opp. 8-9, 12-14). Respondents attempt rather to minimize the significance of the questions presented and the errors in the panel's decision, and to suggest that the Fifth Circuit was not bound to follow this Court's decision in *United States* v. *Power's Heirs*, 52 U.S. (11 How.) 570 (1851), because this Court supposedly erred in that decision. Those efforts are unavailing.

1. As our petition explains (at 16-19), the panel's decision that an "independent action" brought *against* the United States to set aside a consent judgment entered in a previous civil action brought *by* the United States under 28 U.S.C. 1345 may be premised on "ancillary jurisdiction" deriving from the original civil action, without an independent statutory basis for jurisdiction or waiver of sovereign immunity, conflicts with the decisions of other courts of appeals. If left unreviewed, it could allow the reopening of innumerable judgments in actions long ago settled or litigated to final judgment. Our petition further explains (at 17-18) that such a result causes special concern in cases such as this one involving title to real property, and that this Court has repeatedly recognized that "questions affecting titles to land, once decided, should no longer be considered open." *E.g.*, *Arizona* v. *California*, 460 U.S. 605, 620 (1983).

Respondents do not address, much less dispute the existence of, the conflict among the circuits on this question; nor do respondents address the Court's special concerns "for certainty and predictability where land titles are concerned," *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 687 (1979). Rather, respondents contend (1) that "[t]he district court did have ancillary jurisdiction to set aside the consent judgment" because "[t]he court's jurisdiction to hear defensive claims arising out of the same controversy is well established" (Br. in Opp. 8) (citing 7 J.W. Moore, *Moore's Federal Practice* ¶ 60.38, at 60-397 to 60-399 (2d ed. 1995)); and (2) the district court in any event "clearly had jurisdiction under the Quiet Title Act, 28 U.S.C. § 2409a(b), to consider the issues before the court and to ultimately adjudicate title" (Br. in Opp. 9). Neither contention is well founded.

First, as the authors of *Moore's* recognize, (1) "[c]ircuits are split over whether sovereign immunity precludes an independent action against the United States to set aside a judgment," 12 J.W. Moore, *Moore's Federal Practice* ¶ 60.84[1][b], at 60-239 (3d ed. 1997); and (2) "the traditional view is that, whatever jurisdiction a court has to entertain an action for relief from a judgment, the mere fact that the United States is a party to that action 'raises additional jurisdictional issues,'" *ibid.* (citing *United States* v. *Timmons*, 672 F.2d 1373, 1378 (11th Cir. 1982)). The court below clearly departed from that traditional view in deciding that it had jurisdiction over respondents' action to set aside the 1982 consent judgment as a "continuation of the original lawsuit in which jurisdiction was not an issue" (Pet. App. 5a).

Second, nothing in the Quiet Title Act (QTA) authorizes the maintenance of a suit against the United States to set aside a judgment to which the United States was a party. The QTA is a limited waiver of sovereign immunity authorizing suits "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. 2409a(a). Respondents' complaint, moreover, did not request that title be quieted in them, even after they moved to amend their complaint (see Pet. 9). The QTA therefore added nothing to the jurisdiction of the district court to entertain respondents' suit to set aside the judgment in the earlier litigation that they had settled with the United States.

2. Our petition further explains (at 19-24) that the potential instability in titles to federal lands created by the majority's decision is compounded by its erroneous determination that the QTA's 12-year statute of limitations, 28 U.S.C. 2409a(g), is subject to equitable tolling. Respondents do little to address our

submission that the majority's decision cannot be reconciled with the text of the QTA, its history, or the rules governing construction of waivers of sovereign immunity. Rather, they rely entirely on the Ninth Circuit's brief, and erroneous, discussion of those issues in *Fadem* v. *United States*, 113 F.3d 167 (1997), on remand from this Court. See Br. in Opp. 11-12.

The broad significance of the panel's erroneous decision (and that of the Ninth Circuit in *Fadem*) on equitable tolling counsels in favor of review. Respondents incorrectly suggest that review is not warranted because the impact of the decision "will be limited to a portion of Horn Island" (Br. in Opp. 12). To the contrary, the potential impact of the decision extends broadly to otherwise stale claims to federal lands at least throughout both the Fifth Circuit, where the government owns more than 4.7 million acres of land (see United States Dep't of Interior, Bureau of Land Management, *Public Land Statistics—1996*, at 6 (1997) (Table 1-3)), and the Ninth Circuit, where the government owns more than 488 million acres of land (*ibid.*). In both the Fifth and Ninth Circuits, private parties with stale claims to federal lands may now argue that their claims to title should be heard by the courts because of some long-past action or omission by the government that supposedly tolled the statute of limitations.

Respondents contend that the equities favor equitable tolling here because of the supposed failure of the government in the *Adams* litigation to "produce" the Boudreau Grant despite its having been "possessed" by the government (Br. in Opp. 9-10). As our petition explains (at 24 n.18), even if the QTA's limitations period were subject to equitable tolling in some circumstances, no such circumstances are remotely

present here. Respondents do not respond to our showing (Pet. 6, 24 n.18) that the rejected application by the Boudreau heirs for confirmation of the "Boudreau Grant" by a land commission in 1816 was brought to their attention by the government during the *Adams* litigation, yet they admittedly waited nearly a decade following entry of the consent judgment before conducting research into that grant. Moreover, although some of the Commission's records, including a translation of the rejected Boudreau grant, are at the National Archives, there is no evidence that the rejected "grant" itself is or has been in the government's possession, nor have respondents produced an original grant or an actual copy thereof.[1]

3. Our petition explains (at 25-29) that the court of appeals lacked appellate jurisdiction to review the dis-

[1] Respondents make numerous other erroneous factual assertions as well, some of which warrant brief response. Contrary to respondents' assertion that "their ownership" of lands on Horn Island was "generally known and recognized by the * * * federal government" (Br. in Opp. 1), the petition shows (at 4) that the government has openly acted as owner of Horn Island from the early 1800s to the present. Indeed, respondents' own counsel advised them that they could not provide the requisite clear title to the claimed lands to consummate a contract for sale of the lands to the United States because respondents had "no valid claim to ownership of the property" (Pet. App. 43a n.16; see also court of appeals record excerpts (hereafter R.E.) 60). Contrary to respondents' assertion that the $208,175.87 received by them under the 1982 consent judgment was a "nominal settlement" because "[b]oth the Government and [respondents] knew that the market value of the property far exceeded $200.00 per acre" (Br. in Opp. 3), respondents expressly agreed in their settlement document that this amount was "just compensation and in full satisfaction of" their claim to the 729 acres for which their father had paid $82.45 in the 1950 tax sale (see Pet. App. 32a-33a, 58a).

trict court's denial of respondents' motion for summary judgment, and that it compounded its procedural error by quieting title for respondents, in direct conflict with this Court's decision in *Power's Heirs*, *supra*. The petition shows (at 25-27) that there is a conflict among the circuits as to whether a court of appeals may, on appeal from a district court's grant of a dispositive motion terminating the litigation in the defendant's favor, review interlocutory rulings that did not produce the judgment. Respondents do not dispute the existence of that circuit conflict. They assert, however, that the court of appeals had authority to review and reverse the district court's order denying their motion for summary judgment because, they submit, "this case came before the Fifth Circuit on cross-summary judgment motions," as the government's motion to dismiss was "supported by documents, other than the pleadings, which in effect was a summary judgment motion." Br. in Opp. 12.

Respondents' argument rests on an incorrect premise. The government attached copies of the *Adams* litigation documents to its dispositive motion in this case. Those documents were referred to by respondents in *their* complaint and were central to *their* claims. The documents were the United States' complaint in *Adams*, on which respondents' complaint in this case relied as its jurisdictional basis (R.E. 29-46), the *Adams* stipulation and settlement sought to be set aside by respondents (R.E. 46), the *Adams* judgment and order sought to be set aside by respondents (R.E. 46), and the *Adams* order for distribution of funds (R.E. 38). These documents are not "matters outside the pleading" within the meaning of Federal Rule of Civil Procedure 12(b) that convert a motion to dismiss into a motion for summary judgment. As the Tenth Circuit recently held, consistent with all other

circuits that have ruled on the issue, "if a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss." *GFF Corporation* v. *Associated Wholesale Grocers, Inc.*, No. 96-6287, 1997 WL 730690, at *2 (10th Cir. Nov. 25, 1997) (collecting cases).

Respondents also argue that the court of appeals' review of the district court's denial of summary judgment was appropriate because "the facts are not at issue" in this case (Br. in Opp. 13) and the validity of the Boudreau Grant involves only a legal issue (*id.* at 14). That contention, however, cannot be reconciled with their argument that this Court's ruling in *Power's Heirs*—that Bernardo de Galvez lacked authority on August 1, 1781 (the date of the purported grant by de Galvez of Horn Island to Catalina Boudreau) to issue grants to lands east of the Pearl River (which includes Horn Island)—was a *factual* determination, which (they argue) has now been superseded by the court of appeals' more accurate review of the facts (see *id.* at 17-18). Respondents urge the Court to leave undisturbed the court of appeals' judgment, admittedly in square conflict with *Power's Heirs*, because, in their view, "this [C]ourt had an incomplete record before it" when it decided *Power's Heirs* (*id.* at 15). But respondents cannot consistently contend *both* that the court of appeals' entry of judgment in their favor was proper because no facts were at issue *and* that this Court's conflicting decision should be ignored because it was based on an incomplete record and was therefore factually in error.

Nor, in any event, have respondents produced a credible argument that this Court's decision in *Power's Heirs* was premised on an incomplete record. Respondents rely on a "royal Order of February 12, 1781" (Br. in Opp. 18) for the proposition that de Galvez had been authorized to grant lands east of the Pearl River, presuming that this Court did not have the royal order before it when deciding *Power's Heirs*. But that royal order does not call into question this Court's holding in *Power's Heirs*, for it does not indicate that the requisite civil power to grant lands was vested in de Galvez at the time of the Boudreau Grant.

In *Power's Heirs*, the Court explained:

> [T]he rule is, that laws, usages, and municipal regulations in force at the time of the conquest remain in force until changed by the new sovereign. And this raises the question of fact, whether the king of Spain had changed the laws of England existing in the province, by virtue of which the public domain could be granted to private owners, as early as August 1st, 1781, and in their stead adopted the laws of Spain prevailing in Louisiana; as, if the Spanish king had not done so, his officers had no power to grant.

52 U.S. (11 How.) at 577. The Court proceeded to "examine" the "history of Florida and of its conquest by Spain" (*ibid.*), noted that, "[a]t the date of the grant, Spain held in military occupation the country to the east of the island of Orleans, * * * liable to be divested by reconquest or surrender by a treaty of peace" (*id.* at 579), and concluded that "[n]othing is found in these historical details indicating that the Spanish laws had been introduced into Florida, and superseded those of England, and that civil power had

been vested in Galvez to grant lands. As this could only be done directly by the king, all presumptions are opposed to such supposition" (*ibid.*). Respondents identify nothing in the royal order or in Professor Baade's legal memorandum (upon which the court of appeals improperly relied) in conflict with this Court's conclusion in 1851 that de Galvez lacked *civil* authority to grant lands east of the Pearl River on August 1, 1781.[2]

Although respondents decry the "casual manner" in which the government supposedly "casts doubt" on unestablished pre-1783 land-grant claims (Br. in Opp. 20), it is in fact the court of appeals' decision that has casually unsettled long-established land titles. Not only has the court of appeals allowed parties with stale claims to proceed against the United States under the QTA, but it has cast into doubt this Court's longstanding ruling that de Galvez lacked authority to issue land grants on August 1, 1781, and has therefore revived the possibility of claims to land being asserted on the basis of grants by de Galvez long thought to be invalid. Where, as here, respondents already received $208,175.87 as "just compensation" (Pet. App. 3a, 58a) for their father's "long-term investment" of $82.45 (Br. in Opp. 1), there is no basis for leaving undisturbed the court of appeals' judgment

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[2] Moreover, respondents wholly ignore our showing in the petition (at 28-29) that, even if de Galvez had authority to issue the Boudreau Grant, respondents would still have to establish that the Grant was consistent with Spanish law at the time, that Catalina Boudreau's heirs had not forfeited their claim, that the United States had not effected an adverse possession of the lands, and that there was a chain of title between the Boudreaus and respondents. The majority simply presumed the establishment of these facts, without any basis, in quieting title for respondents.

that respondents own a portion of Horn Island and are owed compensation for a "taking" that they value at over $10 million plus interest.[3]

* * * * *

For the foregoing reasons and for those set forth in the petition, the petition for a writ of certiorari should be granted.

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[3] Moreover, this Court has disapproved the presentation of land claims after long delays from the time of the purported land grant on which the claimant relies. As we note in our petition (at 3-4 n.3), Congress in 1844 permitted persons with claims to lands east of the Pearl River "which might have been perfected into a complete title" under a prior sovereign's laws, but for the transfer of sovereignty to the United States, to present their claims to a district court. In *United States* v. *Porche*, 53 U.S. (12 How.) 426, 432 (1852), this Court ruled that the 1844 Act established a jurisdictional bar against any action filed in any court after June 17, 1846, in relation to claims that such a grant was valid. Here, the court of appeals permitted respondents to assert the validity of a claim 150 years after the statutory deadline. Even if the 1844 Act does not establish a jurisdictional bar against consideration of respondents' claims, the Court has repeatedly held that a land claim based on an alleged foreign grant, even if originally valid, is to be considered abandoned when, as here, there has been a great lapse of time before it is asserted. See, *e.g.*, *United States* v. *Hughes*, 54 U.S. (13 How.) 1, 3 (1852) (delay of 36 years to bring suit to enforce Spanish claim held fatal); *Fuentes* v. *United States*, 63 U.S. (22 How.) 443, 460 (1860) (50-year delay); *United States* v. *Repentigny*, 72 U.S. (5 Wall.) 211, 268 (1867) (100-year delay); *United States* v. *Moore*, 53 U.S. (12 How.) 209, 222 (1852) (50-year delay). The Boudreaus themselves made no effort to assert a claim based on the 1781 Grant after its rejection in 1816 by the Commissioner for lands east of the Pearl River. Nonetheless, the court of appeals below permitted respondents to assert a claim based on the Grant more than 180 years after its rejection, even though they have made no showing of a chain of title to the Boudreaus.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

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